Some Leading Judicial Precedents of Our Court

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The history of an institution is the history of its men and their deeds. Men who make history have ever the time to write it; it is always left to the succeeding generations to gather together their imperishable works. As one wades through the law reports of the Allahabad High Court one finds sufficient justification for recounting its pages and one has to reckon its contents as contributions of enduring value. Every court has had great Judges and Advocates and so had ours. Each one has taken from the other and in turn given in the form of judicial precedents. The test of a precedent's greatness is not so much its plurality as immutability. Neither the extent of flesh in it nor the raiment over it would render it virtuous. They would be truly so if they remain unbroken on the anvil of reason. Such a quality we can claim for some of the pronouncements of our High Court and no one can dispute the meed of praise due to them.

In the judicial precedents of Indian Judges one finds the fusion of two distinct streams of jurisprudence, Indian and English. The heterogeneity of population and diversity of culture in the regions of Agra and Oudh were naturally to bring about the birth of different customs and ways of life. Then there was the institution of estate holders with their special customs to regulate their affairs. The repository of personal laws of Hindus and Muslims was their respective texts which could not be self-operative unless applied by Judges. This naturally involved their interpretation. The judgments of this Court for the first forty years present us the spectacle of learned and discerning minds struggling with an intractable and variegated material to accomplish the convergence of all into one systematic whole.

The High Court at Allahabad being a later creation than those in the Presidency towns, their Judges naturally had the advantage of breaking the ice in many fields of law but the necessity for further exploration was nevertheless there, and what more to make the indistinct more distinct. But it is not in this perspective alone that the contribution of the Allahabad High Court to the catalogue of judicial precedents can properly be assessed. We can claim to be precursors also in some regions of law. The learned judgments of distinguished judges like Syed Mahmood, Sir John Edge, Straight, Sulaiman and Niamatullah have bequeathed to us new tracks on which we may all tread to reach our destination.

One of the precedents, to begin with, is to be found in the Full Bench case reported in I. L. R. 2 All. 164, Hanuman Tiwari vs. Chirai. This was a case on Hindu Law and the question debated at the Bar was whether adoption of an only son was valid or not. The Full Bench consisting of the Chief Justice Sir Robert Stuart, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie and Mr. Justice Oldfield dissented from the view of the Calcutta High Court in Upendra Lal Roy vs. Srimati Rani Prasannamoy's (1 BLRAC 221) and held that the adoption of an only son cannot, according to Hindu Law, be invalidated after it has once taken place. Subsequently, the Judicial Committee, in the case of Radha Mohan vs. Hardai Bibi (I. L. R. 22 Mad. 398), affirmed the ratio in Hanuman Tiwari's case.

Jafri Begum vs. Amir Mohammad Khan (I. L. R. 7 All. p. 822), is again a case of signal importance. The question for consideration before the Full Bench was that upon the death of a Mohammedan intestate who leaves unpaid debts with reference to the value of his estate, should the ownership devolve immediately on his heirs or such devolution is contingent upon the payment of such debts. On the questions involved in the Full Bench, the views of the High Courts so repeatedly expressed were in conflict with some of the principles of Mohammedan jurisprudence and the leading judgment of Mr. Justice Mahmood removes the cloud cast by erroneous exposition upon various aspects of Mohammedan Law. The conclusions of Mr. Justice Mahmood are based entirely on the interpretation of Quran as accepted by Mohmmedan jurists. The principle of Jus representations was held to be absolutely foreign to Mohammedan Law of inheritance and the question of devolution of inheritance was to rest entirely upon the exact point of time when the person through whom the heirs claim died.

On the Law of Pre-emption the full Bench judgment of this Court in the case of Gobind Dayal vs. Inayat Ullah (I. L. R. 7 All. 775), has held the field ever since its pronouncement. The exposition of the nature and incidents of the right of pre-emption by Mr. Justice Dwarka Nath Mitter in his very able judgment in the case of Kudrat Ullah vs. Mohini Mohan Shaha (4 Bengal Law Reports 134) seemed to be so conclusive on the subject that one could scarcely conceive of an opposite view on it. The view of Mr. Justice Mitter was that "right of pre-emption was nothing more than a mere right of repurchase, not from the vendor, but from the vendee, who is treated for all intent and purposes legal owner of the property which is the subject-matter of that right". The conclusions of Mr. Justice Mahmood in Gobind Dayal's case on the nature of right of pre-emption, quite at variance from that of Mr. Justice Mitter, were that the nature of the right of pre-emption partakes strongly of the nature of an easement, the dominant tenement and the servient tenement of the law of easement being terms extremely analogous to pre-emptive tenements and pre-emptional tenement of the Mohammedan Law of Pre-emption. The genesis of the Law of Pre-emption has been traced to the principle embodied in Sic utere tuo ut alienum non ladas which created a legal servitude running with the land.

The case of Allahdad Khan vs. Sulaiman Khan, reported in I. L. R. 10 All. 289, is also one of importance and the question involved therein related to the exact scope of the rule of Mohammedan Law relating to the acknowledgment of parentage and whether such acknowledgment could be treated as substitute for adoption recognised in the Roman and Hindu systems. In the Full Bench consisting of Sir John Edge, the Chief Justice, Mr. Justice Straight and Mr. Justice Mahmood, the Court in its learned judgment has held that acknowledgment has only the effect of legitimation whether either the fact of the marriage or its exact time, with reference to the legitimacy of the child's birth is a matter of uncertainty and that a child whose illegitimacy is proved beyond doubt by means of the marriage of its parents being either disproved or found to be unlawful, cannot be legitimized by acknowledgment.

In 1887, a situation rather unprecedented arose in the case of Lal Singh vs. Ghan Shyam Singh (I. L. R. 9 All. 625). The objection raised was that the Court was not legally constituted in accordance with the provisions of the Letters Patent and was incompetent to dispose of the appeal. The argument of late Pt. Ayodhya Nath, counsel for the appellant, was that by clause 2 of the Letters Patent it was provided that the Court should until further provision is made in accordance with the Act consist of a Chief Justice and five Judges and the first holders of

the office had been named and since there existed only a Chief Justice and four Judges, the Court could not be treated as existing in the eye of law. The matter was heard by the entire Court and the unanimous opinion of all the Judges was that the intention behind section 2 of the Letters Patent was not to render the constitution of the Court illegal if the Crown had omitted to fill the vacancy among the Judges under the powers conferred by section 7 of the High Courts Act.

The statute law began to grow with the advent of the 20th Century and with it the complexion. of the judicial precedents also began to change. The litigation in respect of agricultural tenants and the devolution of tenancy also increased. The Courts had also to determine the extent to which the personal laws in the country was to be applied. One of such cases is reported in Acharji Ahir vs. Harai Ahir (A. I. R. 1930 All. 822). This case came up before a Division Bench consisting of Mukerji and Boys, JJ. and related to agricultural tenancy, and the judgment in this case lays down an important principle of law and it is that the ordinary rule of Hindu law that properties acquired while the family was joint and with the help of ancestral or joint family property should be regarded as joint family property and that the burden of proof that it was self-acquired property of a single member should be on that member applied to a case where the property in question is a tenancy.

Constitution of seven Judges Full Bench is not a frequent phenomenon in the life of any High Court. "Has the High Court the power to order a legal practitioner to pay personally the costs of an application, or suit in appropriate circumstances", was the question referred to the Full Bench consisting of Mears, C. J. , Sulaiman, Boys, Banerji, Young, Sen and Niamatullah, JJ. This controversy arose in Execution First Appeal- Mahant Shanta Nand Gir vs. Mahant Basudeva Nand (A. I. R. 1930 All. 225). The Bench hearing the appeal came to the conclusion that "it was a reprehensible proceeding which amounted to an abuse of the process of Court", inasmuch as such an appeal, according to the Bench, should not have been filed; and consequently it issued notice to the Advocate, who had filed it, to answer why he should not be made personally liable for costs.

The view taken by Sulaiman, Banerji and Niamatullah, JJ. was that "it could not be said that the Allahabad High Court, in addition to the powers conferred upon it by the Letters Patent and the powers which the courts situated within its territorial jurisdiction exercised at the time of their abolition, did also possess all the powers of the Supreme Court of the Presidency towns and the province over which the Allahabad High Court exercised jurisdiction was never within the territorial jurisdiction of any of the three Supreme Courts or practitioners in this country". In their answer they observed: "It may however be conceded that the Supreme Court possessed the inherent jurisdiction as the King's Bench Division possessed over its officers. It may further be conceded that the three Presidency High Courts of Calcutta, Bombay and Madras have, over and above, the powers conferred upon them by their respective Charters acquired other powers formerly possessed by their respective Supreme Courts even though the territorial jurisdiction of the Presidency High Courts now extends over the whole of the Presidencies, and not only the Presidency towns to which the jurisdiction of the Supreme Court was limited. In this sense one may say that the Presidency High Courts which have superseded the Supreme Courts, have inherited the inherent jurisdiction of the King's Bench Division". On this premise, the conclusion of Sulaiman, Banerji, Sen and Niamat Ullah. JJ. was that inherent powers of the Supreme Court of Calcutta were not conferred on the Allahabad High Court by the High Courts Act of 1861 and no power to exercise inherent disciplinary jurisdiction over legal practitioners independently of the Legal Practitioners Act and the Indian Bar Councils Act now exists in the Allahabad High Court in respect of the professional or other misconduct or to pass an order for costs against him or impose a fine which are not contemplated by the Act. It was also held by Justice Niamat Ullah in his separate answer to the reference that if a legal practitioner appearing fer one side or other is to be proceeded against for costs of the case for something done professionally, an immense confusion was likely to be occasioned and the right to receive and the liability to pay costs under section 35, C. P. C. must be treated like any other question in the case, and no court of appeal can ever be justified in making it a matter for consideration over the heads of the parties to the case, an action which has all the attributes of a disciplinary measure to which different consideration should apply, hence section 35, C. P. C. could not be deemed to confer any power to award costs against a legal practitioner except to the extremely limited extent. On the origin and the genesis of the difference in the nature of the Allahabad High Court's jurisdiction from that exercised by the High Courts in Presidency towns, this Judgment has always been considered to be a leading one.

Whether a Barrister enrolled in England and admitted as an Advocate of the High Court can maintain a suit for his fee was answered by the Allahabad High Court in the Civil Revision, Nihal Chand Shastri vs. Dilawar Khan reported in A. I. R. 1933 All. 417. Nihal Chand Shastri who was enrolled in England as a Barrister was practising as an Advocate of this High Court at Muzaffarnagar. He sued Dilawar Khan for his fee. The decree in plaintiff's favour was impugned in the aforesaid Civil Revision in the High Court. The question of maintainability of a suit by a Barrister for his fee having been decided earlier by a Full Bench, the matter had to be referred to a larger Bench of five Judges, namely Mukerji, Acting C. J., Young, King, Thorn and Niamatullah, JJ. The answer of the Full Bench to the reference was that the peculiar position of a Barrister-at-law in England disappears in the province of Agra on his being admitted as an Advocate of the High Court, inasmuch as he combines in himself the capacities of a Barrister and Solicitor of England. In England a barrister could not act, nor receive instructions from a client except through a solicitor but this disability could not operate against him if he has been enrolled as an Advocate of this Court. In the words of the Acting Chief Justice "they do not practise as Barristers but as Advocates and the rules permit them to see their clients, settle their fee and to act for them". The ratio upon which the conclusions of the Full Bench were founded was that the English Barrister practises in the courts in these provinces not by virtue of being a Barrister but by dint of his enrollment as an Advocate. Such a suit was held to be maintainable and the earlier Full Bench in I. L. R. 25 All. 509 was overruled.

I would now refer to a very illuminating judgment of a Full Bench of this court on the scope and applicability of the Hindu Widow Remarriage Act. In the case of Bhola Umar vs. Musammat Kaushilla, the Full Bench consisting of Sulaiman, C. J., Mukerji and King, JJ. has laid down that the Act was intended to render remarriage valid and to legalise the legitimacy of children. "It conferred a benefit on those who could not remarry, but at the same time imposed a restriction on them. It was not intended to deprive those who already possessed the right to remarry of whatever rights they enjoyed in their deceased husbands' properties". Retention or forfeiture of interest was held merely to be a legal incident of the custom of remarriage and in cases where a Hindu widow's right to remarry was governed by the custom of her caste, the question of retention or forfeiture of her interest in her deceased husband's estate should also be governed by custom.

The question whether a Hindu not a leper by birth but subsequently becoming afflicted by leprosy was completely divested of his rights in the ancestral property, came up before a Full Bench consisting of Sulaiman, C. J., Bennet and Bajpai, JJ. The judgment is reported in A. I. R. 1937 All. 605. The answer of the full Bench proceeding upon the intcrpretation of various texts on Hindu Law was that a person who had not been leper from birth, but was afflicted with leprosy of a samious or virulent type at the time of death of his father and had previously acquired an interest in the joint family property by birth, would not be completely divested of such an interest though debarred from claiming partition.

In the same issue, i.e. A. I. R. 1937 All. 610, is reported another noteworthy pronouncement of the Full Bench consisting of Sulaiman, C. J., Thom and Bennet, JJ. It was a case involving a contract by a minor and it was laid down that a minor is not estopped from pleading that the contract is void on. ground of minority despite the false representation as to his age coming from him. Equally important principle contained in the decision of the Full Bench is that it is hardly open to an Indian Court to invent a new rule of equity for the first time contrary to the English Law and if the law in England is clear and there is no statutory enactment to the contrary in India, one should hesitate to introduce any supposed rule of equity in conflict with that law.

Now, we come to a leading case in the realm of criminal law and it is the famous Meerut conspiracy case, S. H. Jhabawala and others vs. Emperor, reported in A. I. R. 1933 All. 690. The accused in this case were prosecuted under section 121-A, I. P. C. for conspiracy. Almost every aspect of law relating to criminal conspiracy has been touched in the judgment of Sulaiman, C. J. and Young, J. but only a few of them may be referred to. The principle laid down in this case is that any conspiracy to change the form of the Government of India or of any local Government even though it may amount to an offence under another section of the Code would not be an offence under section 121-A of the Indian Penal Code, unless it is a conspiracy to overawe such Government by means of a criminal force or show of criminal force but a conspiracy to establish the complete independence of India as distinct from obtaining for it the status of a self-governing dominion within the British Empire or a perfectly democratic or a republican form of Government in India outside the British Empire, would be tantamount to conspiring to deprive His Majesty of the Sovereignty of British India and such a conspiracy comes within section 121-A. The Full Bench has further laid down that as in law the King never dies, it is enough for the prosecution to prove that there was conspiracy to deprive the King Emperor of the Sovereignty of British India and the question whether the conspiracy is expected to succeed in the lifetime of His Majesty the King Emperor or that of his successor was wholly immaterial.

On the question whether a High Court has the power to arrest for contempt of itself a person residing outside the jurisdiction of that court which arose in Emperor vs. B. G. Horniman (I. L. R. 1944 Alld. 665), the pronouncement of the Allahabad High Court has been unequivocally recognised as laying down the correct law on the subject. Mr. Horniman, Editor and Publisher of the 'Bombay Sentinel' published an article containing words which had tendency to bring the High Court of Allahabad into contempt. Two successive notices were issued to Horniman and on his failing to appear in response to them, a bailable warrant of arrest against him was issued. The Chief Magistrate passed an order enlarging Horniman on bail of Rs. 1, 000 without deposit, with one surety in a like amount to appear before the High Court of Judicature at Allahabad. Against this order Horniman preferred a revision in the Bombay High Court which held that there was no power in the Allahabad High Court to arrest a man for contempt of itself outside the jurisdiction of that High Court, nor has any High Court power to arrest a person for contempt of another High Court and consequently the order of the Chief Presidency Magistrate was set aside. When the hearing of this contempt case against Horniman came up before the Allahabad High Court in the Division Bench of Collister and Allsop, JJ. they considered it useless to reissue process to Bombay and contended itself by issuing a warrant to I. G. Police, U. P. to have it executed if and when the respondent set his foot within the local jurisdiction of the Allahabad High Court. However, the reasoning of the Bombay High Court was not accepted by the Division Bench of Allahabad and the view that the Division Bench of Allahabad took was that "a contempt of the High Court is an act made punishable under a law for the time being in force within the meaning of section 4 (0), Cr. P. C. and such offence can be enquired into according to the provisions of that Code as set out in section 5 (2) and consequently where a contempt had been committed within the territorial jurisdiction of a High Court in India, such court is competent to issue process to secure the attendance of the offender wherever he may be residing in British India as in the case of an offence under the Penal Code or under any other Act.

On constitutional matters the pronouncement of every High Court and so of the Allahabad High Court ever since the commencement of the constitution, have proceeded in an unabated course but few of them can be said to have retained their significance owing to the fact that there has scarcely been any case of importance which has not been greeted with the pronouncement of the Supreme Court. Despite this, a few pronouncements of our Court on constitutional questions would always be reckoned for their erudition and juristic principles. The judgment of this court in the writ petition Moti Lal vs. State of U. P. (A. I. R. 1951 All. 257) under Article 226 of the Constitution can do credit to any distinguished exposition on the subject of constitutional law.

The petitioners in seeking mandamus in this case had claimed an absolute right to carry passengers on hire on the highway along the routes selected by them and contended that the State had no better rights than the private bus owners and the provisions of the Motor Vehicles Act which discriminate between- the State and the private owners in respect of carrying on business of motor transport were contrary to article 14 of the Constitution. The judgment of the Full Bench consisting of five Judges (Malik, C. J. and Mootham, Sapru Wanchoo and Agarwala, JJ.) contains an illuminating exposition of the constitutional principles and a passage from it may be quoted. Mr. Justice Sapru has observed: "It is clear that the position of the State as a great juristic person is not identical with that of a juristic person in all respects. At the same time it is further clear that when the State engages itself in a commercial undertaking, trade or business or enters into a contract, it is acting to use the language of Prof. Holland, as a quasi-private juristic person, who should have in that sphere of business no more rights than any other private citizens."

Before I conclude, I must allude to a recent pronouncement of this Court, on the scope of emergency legislation and its bearing on the rights of citizens. The case is Civil Miscellaneous Writ No. 4308 of 1964 - Kumaon Motor Owners' Union Ltd. vs. State of U. P. - a petition under Article 226 of the Constitution and decided by a Bench consisting of Jagdish Sahai and Broome, JJ. wherein a notification under Rule 131 (2)(gg) was challenged on the ground that it travelled beyond the scope of the aforesaid rule and inasmuch as it prohibited the plying of the

vehicles of all private operators in the region in question, it exceeded the permissible limits and that the sole motive for the impugned notification was to nationalise the route without having recourse to the provisions of Chapter IV-A of the Motor Vehicles Act and with. out paying compensation. In upholding the validity of the notification and the order under the rule, the Division Bench has held that the "object of the impugned notification is not to create a monopoly or to nationalise the route within the meaning of Chapter IV-A of the Motor Vehicles Act or in the sense in which these terms are understood in social legislations. The Government had decided to ply exclusively its vehicles not as a commercial undertaking but to provide a service on the ground of national security, in other words, a measure of defence". On the question whether compensation was payable to persons prohibited from plying their motor vehicles, the answer of the Bench is "Inasmuch as Rule 131 (2) (gg) clearly permits complete prohibition also, it would be impossible to hold that complete prohibition is beyond its scope". In the opinion of the Bench "it is a mistake to think it to be one requisitioning or acquiring property. The real nature, the essential quality, in other words, the pith and substance of that part of the order is preventive, the object being to restrain persons from carrying on activities which may jeopardise national security, and in such a case no question of payment of compensation obviously arises." The judgment is remarkable for its enunciation of the principles governing the interpretation of emergency statutes in contradistinction to those governing the normal law of the land and also for striking a note on the extent of the individual rights in a state of emergency.

These are a few gleanings from the causes celebres of our High Court that speak to us of the past of our Court. But they are not all and in the pages of law reports still more, equally worthy of a place in the present narration, are to be found. My only explanation for their omission is my consciousness of the space that my subject should occupy, in exceeding which I would only be accusable of encroachment upon the share of others. A bout the present, indeed not less eventful than the past, I pause and think, should I really be so reticent as I have been. We have picked up and gathered after our progenitors the corn they have grown and left behind. The past belongs to us and the present to those after us. It is they who have to glean our accounts to preserve us for posterity. This is the convention of eternity and if the succeeding generations are faithful to it we shall not be lost.